EDITOR'S NOTE

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ORIGINAL

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAMES A. FORD,
Petitioner,
vs.
STATE OF GEORGIA,
Respondent,

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, JAMES A. FORD who is now held on death row at the Georgia Diagnostic and Classification Center in Jackson, Georgia asks leave to file the accompanying Petition for a Writ of Certiorari without prepayment of cots and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court.

Petitioner submits the accompanying affidavit in support of his motion and further submits that he was granted leave to proceed in forma pauperis in the courts below, on trial and appeal due to his indigency.

Supreme Court, U.S.
FILED
APR 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

Respectfully submitted,

Attorney at Law

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COUNSEL FOR PETITIONER

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAMES A. FORD,
Petitioner,

vs.

STATE OF GEORGIA,
Respondent,

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA
APPENDIX

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QUESTIONS PRESENTED

1. MAY GEORGIA AVOID COMPLIANCE WITH THIS COURT'S REMAND ORDER REQUIRING RECONSIDERATION OF PETITIONER'S CASE IN LIGHT OF GRIFFITH v. KENTUCKY BY DECLARING THAT A PRE-BATSON CHALLENGE UNDER THE FOURTEENTH AMENDMENT TO A PROSECUTOR'S RACIALLY DISCRIMINATORY USE OF PEREMPTORIES IS A DIFFERENT CONSTITUTIONAL CLAIM UNDER "SWAIN"?

2. MAY RETROACTIVE APPLICATION OF THE NEW CONSTITUTIONAL RULE ANNOUNCED IN BATSON, ESTABLISHED IN GRIFFITH, BE VOIDED BY INVOKING A PREVIOUSLY UNANNOUNCED STATE OBJECTION PROCEDURE AS A PROCEDURAL BAR?

3. DOES THE SIXTH AMENDMENT FAIR CROSS-SECTION REQUIREMENT PROHIBIT THE PROSECUTOR'S RACIALLY DISCRIMINATORY USE OF PEREMPTORY CHALLENGES IN THE SELECTION OF JURORS?

SUPREME COURT OF GEORGIA

ATLANTA February 15, 1988

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

JAMES A. FORD, JR. v. THE STATE

In view of the Motion for Reentry of Judgment Deniying Rehearing filed in this case, it is hereby ordered that the September 1987 Term is extended for the sole purpose of vacating this Court's December 16, 1987, order denying reconsideration in this case and entering such an order this date, which is hereby done.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams Clerk.

FORD
v.
The STATE.
No. 42154.
Supreme Court of Georgia.
Nov. 30, 1987.

Defendant was convicted in the Coweta Superior Court, William F. Lee, Jr., J., of armed robbery, rape, kidnapping with bodily injury, burglary and murder, and was sentenced to death, and he appealed. The Supreme Court, 255 S.E.2d 567, affirmed, and defendant petitioned for writ of certiorari. The United States Supreme Court, 107 S.Ct. 1268, vacated and remanded. On remand, the Supreme Court, Smith, J., held that: (1) any *Batson*-type objection to prosecutor's alleged discriminatory use of peremptory strikes had to be made before jurors were sworn, and (2) defendant's pretrial motion to restrict prosecutor's alleged racial use of peremptory challenges was not contemporaneous objection to composition of jury as selected, so that where no such objection was raised before jurors were sworn, defendant was barred from raising *Batson*-type complaint.

Judgment affirmed upon remand.

Gregory, J., dissented and filed opinion.

Hunt, J., dissented.

1. Jury ⇐136
Prosecutor may not strike black juror solely because of his race, nor upon any assumption based solely upon juror's race. U.S.C.A. Const.Amend. 14.

2. Jury ⇐142
Any *Batson*-type objection to prosecutor's alleged discriminatory use of peremptory strikes must be raised prior to time that jurors selected to try case are sworn. U.S.C.A. Const.Amend. 14.

3. Jury ⇐142
Defendant's pretrial motion to limit prosecutor's alleged racial use of peremptory challenges was not contemporaneous objection to composition of jury as selected, so that where no such objection was raised before jurors were sworn, defendant was barred from later raising *Batson*-type complaint. U.S.C.A. Const.Amend. 14.

SMITH, Justice.

Ford v. State, 255 Ga. 91, 335 S.E.2d 567 (1985), was pending before the Supreme Court of the United States when *Griffith v. Kentucky*, 479 U.S. ——, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), was decided on January 13, 1987. *Griffith* established the principle that the ruling in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), applied retroactively to all cases, state or federal, pending on direct review when *Batson* was decided. Thus, in keeping with *Griffith*, supra, the Supreme Court of the United States vacated its grant of Ford's petition for writ of certiorari, U.S. Supreme Court Case No. 85-6253, and on March 25, 1987, remanded the case to the Supreme Court of Georgia for further consideration in light of *Griffith v. Kentucky*, supra, — U.S. ——, 107 S.Ct. 1268, 94 L.Ed.2d 129 (1987).

[1] 1. *Batson* stands for the principle that a prosecutor may not strike a black juror solely because of his race, nor upon any assumption based solely upon the juror's race. 106 S.Ct. at 1723. See *Gamble v. State*, 257 Ga. 325, 357 S.E.2d 792 (1987).

2. In *Batson*, the defense counsel moved to discharge the jury before it was sworn on the ground that the prosecutor's removal of the black veniremen, through the use of peremptory challenges, violated his 6th and 14th Amendment rights. The *Batson* Court observed that, "[the] petitioner made a timely objection to the prosecutor's removal of all black persons on the venire." Id. 106 S.Ct. at p. 1725. The Court also observed: "In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today." Id. at p. 1724, fn. 24. It went on to state that

it expressed no view as to how a court should handle the matter, upon a finding of discrimination against black jurors, but made it clear that it must be handled in such a manner as to erase the discrimination in the jury selection.

[2] 3. *Batson* may be understood to require that any objection as to peremptory strikes be made *before* the trial of the case begins. This is further supported by *Griffith*, supra, 107 S.Ct. at p. 710, where the facts show that the motion to discharge the panel based upon a discriminatory selection of jurors was made immediately after the selection process was completed and before trial had begun. It is consistent with our holding in *State v. Sparks*, 257 Ga. 97, 98, 355 S.E.2d 658 (1987), where we held that "any claim under *Batson* should be raised prior to the time the jurors selected to try the case are sworn."

4. In this case, Ford filed a "Motion To Restrict Racial Use of Peremptory Challenges."[1] This motion was based on the law as it existed at that time under *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965)—that is, that the defendant must show a pattern of systematic exclusion of blacks as jurors in criminal trials within the circuit. Ford offered no proof of his contentions.

(a) The trial court denied the motion on October 10th, ten days before the trial began In commenting upon this denial on the second day of the trial, the judge stated that he had seen "numerous or several cases" in which there were black defendants and the district attorney's office struck white prospective jurors and left prospective black jurors on the jury. "I have seen that happen here and in other counties in the circuit."

(b) After the jury had been selected and sworn in, the trial court afforded the defense an opportunity to make any necessary motions. None was made.

(c) In the direct appeal from Ford's conviction, this court found that he had failed to demonstrate a pattern of systematic exclusion of blacks from criminal juries in the circuit. *Ford v. State*, 256 Ga. 81, 82(1), 335 S.E.2d 567.

5. Under *Griffith*, it is now unquestioned that Ford may insist upon the *Batson* issue, notwithstanding that his conviction preceded the date of that opinion.

But nothing in *Griffith* would warrant the extension of relief upon grounds never raised at trial. Indeed, all that *Griffith* dictates is that objections made—at trial—must be resolved under the *Batson* rule, whether or not they antedated the enunciation of that rule.[2]

6. We have delineated a time period within which a *Batson* motion is timely.

(a) In *State v. Sparks*, 257 Ga. 97, 355 S.E.2d 658, we allowed as timely a *Batson*

1. The motion was as follows: "Now comes JAMES FORD, the Defendant in the above styled action, and moves the Court to restrict the Prosecution from using it's peremptory challenges in a racially biased manner that would exclude members of the black race from serving on the Jury. In support of this Motion, the Defendant shows:

1.

"The Prosecutor has over a long period of time excluded members of the black race from being allowed to serve on the Jury where the issues to be tried involve members of the opposite race.

2.

"This case involves a black accused and the victim is a member of the white race.

3.

"It is anticipated that the Prosecutor will continue his long pattern of racial discrimination in the exercise of his peremptory strikes.

4.

"The exclusion of members of the black race in the Jury when a black accused is being tried is done in order that the accused will receive excessive punishment if found guilty, or to inject racial prejudice into the fact finding process of the Jury. See *McCray vs. New York*, [461] U.S. 961 [103 S.Ct. 2438, 77 L.Ed.2d 1322], 33 Cr.L. 4067 (82-1381, May 31, 1983); *Taylor vs. Louisiana*, 419 U.S. 522 [95 S.Ct. 692, 42 L.Ed.2d 690] (1975).

"WHEREFORE, the Defendant prays that this Court enter an Order granting the relief requested herein."

2. "We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith*, 107 S.Ct. at 709.

motion that was made shortly after the jurors had been sworn. We held that "hereafter any claim under *Batson* should be raised prior to the time the jurors selected to try the case are sworn." In *Riley v. State*, 257 Ga. 91, 94(3), 355 S.E.2d 66, we held as untimely a *Batson* motion that was made after the jury had been sworn and five witnesses had testified.

[3] (b) Ford made no contemporaneous objection to the composition of the jury as selected. His pre-trial motion was not an objection to the jury as selected, but to an alleged pattern of systematic exclusion of black jurors. There was no objection made after the jury was sworn.

(c) Further, even if colloquy in the trial judge's chambers on the second day of trial might be interpreted as a *Batson* motion, it would not have been timely under *Riley v. State*, supra.

7. The determinative issue thus becomes whether our contemporaneous objection rule is a valid state procedural bar to Ford's *Batson* complaint.

In *Wainwright v. Sykes*, 433 U.S. 72, 90, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977), the United States Supreme Court held:

"A defendant has been accused of a serious crime, and [the trial] is the time and place for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the court-room, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the results that these proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification."

8. We now conclude this matter as follows:

(a) Ford's motion under *Swain*, having been decided adversely to him on appeal, cannot be reviewed in this proceeding. *Ford v. State*, supra.

(b) While the circumstances of the jury selection may raise implications under *Batson*, and are not precluded from review under the authority of *Griffith*, Ford made no objection to the composition of the jury after it was selected and before the trial commenced.

(c) The rules of our state require that a defendant who questions the composition of his trial jury must make objection "prior to the time the jurors selected to try the case are sworn." *Sparks*, supra.

(d) The failure of Ford timely to object is a valid state procedural bar to any complaint he may have under *Batson*. *Wainwright v. Sykes*, supra.

9. Upon remand from the United States Supreme Court, we adhere to our initial judgment of affirmance.

Judgment affirmed upon remand.

All the Justices concur except GREGORY and HUNT, JJ. who dissent.

GREGORY, Justice, dissenting.

Prior to trial, Ford filed a motion asking the trial court "to restrict the Prosecution from using its peremptory challenges in a racially biased manner that would exclude members of the black race from serving on the jury." This motion was denied by the trial court. Subsequently, the prosecutor exercised nine of his ten peremptory challenges against blacks.

On direct appeal, this court, like the trial court, ruled on the issue without having the benefit of the pronouncement of the United States Supreme Court in the since-decided case of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). See *Ford v. State*, 255 Ga. 81(1), 335 S.E.2d 567 (1985). Now, having held that *Batson* applies retroactively to cases, such as this one, that were tried prior to *Batson* but were still pending on direct appeal when *Batson* was decided, *Griffith*

v. *Kentucky*, 479 U.S. ——, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), the United States Supreme Court has remanded the case to us for reconsideration under *Batson*.

Today, the majority of this court holds that because Ford raised the discrimination issue before the jury selection began, it was not timely, or was not really a *Batson*-type objection at all.

While I agree that "nothing in *Griffith* would warrant the extension of *relief* upon *grounds never raised at trial* ..." (majority at p. 768), I cannot agree that Ford never raised a *Batson*-type claim, nor do I think that we may avoid addressing the merits of a *Batson* issue that was raised at trial on the ground that it was raised too soon under a procedural rule of timeliness that we created *after* the case was tried.

I do not doubt that we may establish procedural rules regarding the correct time to raise *Batson* claims. But other than the general rule that issues cannot be raised for the first time after trial, no procedural rules governing the raising of *Batson* claims were in existence when Ford's case was tried, for the very simple reason that *Batson* had not yet been decided.

We say now that the *Batson* claim should have been raised after the jury was selected. There is nothing wrong with this rule. However, Ford had no way of knowing but what if he had waited until after the jury was selected to raise the issue, we would have held that he waited too late; that he should have raised the issue prior to trial, so that the prosecutor would be on notice that his exercise of peremptory challenges would be scrutinized for racial discrimination.

Because the procedural rule on which the majority relies to avoid reaching the merits of Ford's *Batson* claim did not exist when Ford's case was tried, it cannot possibly be "the sort of firmly established and regularly followed state practice that can prevent implementation of [Ford's] federal constitutional rights." *James v. Kentucky*, 466 U.S. 341, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984). Moreover, such an "unannounced" and "novel application of a procedural bar of which [Ford] 'could not fairly be deemed to have been apprised ...' [Cit.]" will not bar "federal habeas review of this claim ..." *Mann v. Dugger*, 817 F.2d 1471 (11th Cir.1987).

Prior to trial, Ford moved the trial court to restrict the prosecutor from exercising his peremptory challenges in a racially discriminatory manner. The trial court denied the motion. After the jury was selected, the prosecutor offered to explain his peremptory challenges. The trial court ruled that such a proffer would be unnecessary, notwithstanding that the prosecutor had exercised nine of his ten peremptory challenges against blacks.

Inasmuch as *Batson* had not been decided when this case was tried, the trial court's rulings were understandable. Nonetheless, under *Batson* they were erroneous.

I dissent to the majority opinion. I would remand this case to the trial court to give the prosecutor an opportunity to rebut the prima facie case of discrimination under *Batson*.

No. 86-6888, Alvin Tolliver, Petitioner v United States

February 23, 1987. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of Griffith v Kentucky, 479 US ——, 93 L Ed 2d 649, 107 S Ct 708 (1987).

Same case below, 780 F2d 1177.

No. 86-1961, Eugene Leslie, Petitioner v United States

February 23, 1987. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of Griffith v Kentucky, 479 US ——, 93 L Ed 2d 649, 107 S Ct 708 (1987).

Same case below, 785 F2d 541.

No. 86-5199, Joseph A. Nurse and Curtis Johnson, Petitioners v Illinois

February 23, 1987. On petition for writ of certiorari to the Appellate Court of Illinois, First District. The motion of petitioners for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Appellate Court of Illinois, First District, for further consideration in light of Griffith v Kentucky, 479 US ——, 93 L Ed 2d 649, 107 S Ct 708 (1987).

Same case below, 131 Ill App 3d 590, 475 NE2d 1000.

No. 86-6849, Carlos A. Robinson, Petitioner v Illinois

February 23, 1987. On petition for writ of certiorari to the Appellate Court of Illinois, Fifth District. The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Appellate Court of Illinois, Fifth District, for further consideration in light of Griffith v Kentucky, 479 US ——, 93 L Ed 2d 649, 107 S Ct 708 (1987).

Same case below, 131 Ill App 3d 590, 475 NE2d 1000.

No. 86-6852, James A. Ford, Petitioner v Georgia

February 23, 1987. On petition for writ of certiorari to the Supreme Court of Georgia. The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Georgia for further consideration in light of Griffith v Kentucky, 479 US ——, 93 L Ed 2d 649, 107 S Ct 708 (1987).

Same case below, 255 Ga 81, 335 SE2d 567.

No. 86-5949, Donnell White, Petitioner v Missouri

February 23, 1987. On petition for writ of certiorari to the Court of Appeals of Missouri, Western District. The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeals of Missouri, Western District, for further consideration in light of Griffith v Kentucky, 479 US ——, 93 L Ed 2d 649, 107 S Ct 708 (1987).

Same case below, 694 SW2d 802.

No. 86-6818, Xavier Williams, Petitioner v Illinois

February 23, 1987. On petition for writ of certiorari to the Appellate Court of Illinois, Third District. The

APPENDIX D

IN THE SUPREME COURT OF GEORGIA

JAMES FORD,
Appellant,
v.
STATE OF GEORGIA,
Appellee.

Case No. 42154

MOTION FOR REHEARING AND
MEMORANDUM IN SUPPORT OF THE MOTION FOR REHEARING

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JAMES FORD,
Appellant,
v.
STATE OF GEORGIA,
Appellee.

Case No. 42154

MOTION FOR REHEARING

James Ford, a black man who has been convicted of capital murder, respectfully requests of this court a rehearing on the question of whether the prosecutor's peremptorily striking 9 of 10 black jurors at Mr. Ford's trial is procedurally barred as decided by this Court in its opinion announced on November 30, 1987, or requires remand of this case back to the trial court for an evidentiary hearing. In support of this motion, Mr. Ford states the following:

1. On October 24-25, 1984, Mr. Ford was convicted and sentenced to death for capital murder. During pre-trial, at the trial, and at a hearing on a motion for new trial on January 18, 1985, Mr. Ford challenged the prosecutor's racially discriminatory use of peremptory challenges.

2. The issue was raised to this Court on direct appeal and decided on the merits adversely to Mr. Ford on October 29, 1985. On January 22, 1986, a petition for certiorari was filed in the United States Supreme Court on the question of racially discriminatory use of peremptories at Mr. Ford's capital trial, No. 85-6253.

3. On February 23, 1987, certiorari was granted by the United States Supreme Court; judgment was vacated and the case was remanded back to this Court for further consideration in light of Griffith v. Kentucky, 479 U.S. ___, 93 L.Ed.2d 649 (1987).

4. On November 30, 1987, this Court held, without benefit of briefing and argument, that Mr. Ford's challenge to the prosecutor's racially discriminatory use of peremptories is now procedurally barred because it was untimely. (Slip opinion, at 8).

5. Appellant respectfully submits that this court's ruling does not comply with the United States Supreme Court order and remand in this case and overlooks critical facts supporting the adequacy of Mr. Ford's objection to the prosecutor's racially discriminatory use of peremptories.

6. The facts and circumstances of this issue in this case, and the relevant case law do not support an application of any procedural bar to review of this issue.

WHEREFORE, Mr. Ford respectfully requests this court to

grant Mr. Ford's motion for rehearing and schedule briefing and oral argument on whether Mr. Ford's challenge to racially discriminatory use of peremptories is procedurally barred, requires a remand to the trial court for an evidentiary hearing on the prosecutor's use of peremptory challenges or requires a reversal of the conviction and sentence.

Respectfully submitted,

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IN THE SUPREME COURT OF GEORGIA

JAMES FORD,
Appellant,
v.
STATE OF GEORGIA,
Appellee.

Case No. 42154

MEMORANDUM IN SUPPORT OF THE MOTION FOR REHEARING

On November 30, 1987, this court held, without briefing or argument, that Mr. Ford's challenge to the prosecutor's racially discriminatory use of peremptories is now procedurally barred because it was untimely. (Slip opinion, at 8).

This court in reviewing Mr. Ford's case first reached the conclusion that "Ford's motion under Swain, having been decided adversely to him on appeal, cannot be revieved in this proceeding." (Slip Op., 8). Appellant respectfully contends that this Court's conclusion cannot be squared with Batson v. Kentucky, 476 U.S. ___, 90 L.Ed.2d 69 (1986), Griffith v. Kentucky, 479 U.S. ___, 93 L.Ed.2d 649 (1987), or the United States Supreme

Court's remand in this case.[1]

During proceedings prior to Mr. Ford's trial, trial counsel---Mr. Edge, filed a motion to object to the prosecutor's use of peremptory challenges in a racially discriminatory manner. Trial counsel "anticipated that the Prosecutor will continue his long pattern of racial discrimination in the exercise of peremptory strikes" ("Motion to Restrict Racial use of Peremptory Challenges"), and requested that the trial court preclude the prosecutor from so doing. At the pre-trial hearing on this question, Mr. Edge additionally requested that reasons be given for the striking of any black jurors:

> Mr. Edge: Your, Honor, in so far as evidence goes, I just would like to state in my place that its' been my experience, and the Court is aware that the district attorney and the other district attorneys have a history and a pattern when you have a defendant who is black, of using peremptory challenges to excuse po-

---

1. Appellant would note that this court's opinion, decided on November 30, 1987, states that the "Supreme Court of the United States vacated its grant of Ford's petition for certiorari, U.S. Supreme Court Case No. 85-6253, and on March 25, 1987, remanded to the Supreme Court of Georgia for further consideration in light of Griffith v. Kentucky, supra." (Slip Op., at 1-2). However, the United States Supreme Court in this case granted certiorari on March 25, 1987 and the judgment of this Court was vacated. The case was then remanded back to this court for consideration in light of Griffith. 479 U.S. ___, 94 L.Ed.2d 129, 107 S.Ct. 1268 (1987).

> tential jurors who are also black. We are requesting the Court to require the district attorney, if he does use his peremptory challenges to excuse potential black jurors, to justify on the record the reason for excusing them. His failure to do so we feel would evidence the fact that he is using them in a discriminatory manner, that is, excusing jurors solely because they are black and for no other reason.

(10/12/84 Pre-Trial T. 160-61). The trial court, relying on the evidentiary standards set out in Swain v. Alabama, 380 U.S. 202, 13 L.Ed.2d 759, 85 S.Ct. 824 (1965), denied this request. (10/12/84 Pre-Trial T. 162).

At trial it was established that the Prosecutor used peremptories to strike nine out of ten blacks. (T. 267-268). The trial court however, again implicitly relying on Swain, made note of the fact that not all blacks had been struck in Mr. Ford's case. (T. 268). Again, at a motion for new trial held on January 18, 1985, the trial judge refused to recognize the asserted violation of Mr. Ford's constitutional rights based on the prosecutor's racially discriminatory use of peremptory challenges.

On direct appeal to this court, Mr. Ford's challenge to the prosecutor's racially discriminatory use of peremptory challenges was again addressed. Ruling on the merits, this court rejected Appellant's claim, concluding that Mr. Ford "failed to establish a systematic exclusion of black jurors, leading to a general condition that black citizens do not serve on criminal trial

juries in the circuit." Ford v. State, 335 S.E.2d 567, 572 (Ga. 1985).

In Batson, the United States Supreme Court was required to reexamine the "evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." Batson, 90 L.Ed.2d at 77. After undertaking this examination, the Court held that with regard to use of peremptory challenges in a criminal trial, "a consistent pattern of official racial discrimination is not a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions." Batson, at 87, citing, Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 (1977).

Thus the Court's holding---after establishing in Griffith that Batson is applicable to cases pending on direct appeal such as Mr. Ford's case, overrules the analysis of the trial court who relied on the fact that not all blacks had been struck and that black defendants had not been peremptorily struck in other cases, and also overrules the analysis of this court on direct appeal in concluding that Mr. Ford had failed to "establish a systematic exclusion of black jurors, leading to a general condition that black citizens do not serve on criminal trial juries in the circuit." Ford, 335 S.E.2d at 572. Consequently, the United

States Supreme Court granted certiorari and remanded back to this court for review.

Appellant respectfully contends therefore that this court cannot now conclude "Ford's motion under Swain, having been decided adversely to him on appeal, cannot be reviewed in this proceeding." (Slip Op., 8). The United States Supreme Court remanded this case back to this court for just such review. The implied res judicata effect of this court's earlier decision on this claim cannot be reconciled with the United States Supreme Court's order vacating that very decision or this court's own order "that this court's said judgment of October 29, 1985 be hereby vacated and its opinion be withdrawn from the files." (See Attached Order of November 30, 1987).

Similarly, no distinction can now be drawn between a challenge to racially discriminatory use of peremptories under Swain and a challenge under Batson such that a claim is properly preserved under Swain but not under Batson. The claims are identical in that they challenge racially discriminatory use of peremptories as being violative of the Equal Protection Clause of the Fourteenth Amendment. Batson simply changes the evidentiary standard by which the merits of the same claim are to be determined. Having reached the merits earlier on appeal, this court should now reach the merits of Appellant's claim and order a remand to the trial court for an evidentiary hearing.

B. Adequate Objection to the Prosecutor's Racially Discriminatory Use of Peremptories Was Made in This Case.

This court's November 30, 1987 decision does not address the critical argument of trial counsel at the October 12, 1984 pretrial hearing cited above, and the express request to make the prosecutor give reasons for his striking of black jurors. Given that the trial court denied trial counsel's request, there was absolutely nothing for counsel to do contemporaneous with the striking of black jurors with peremptories during jury selection. The trial court had already ruled that the prosecutor would not be restricted in using his peremptories in a racially discriminatory manner and that the prosecutor would have to give no reasons for striking black jurors. (10/12/84 Pre-Trial T. 162)

In Batson, the Court overturned "the principal holding in Swain v. Alabama, 380 U.S. 202, 13 L.Ed.2d 759, 85 S.Ct. 824 (1965), that the Constitution does not require in any given case an inquiry into the prosecutor's reasons for using his peremptory challenges to strike blacks from the petit jury panel in the criminal trial of a black defendant and that in such a case it will be presumed that the prosecutor is acting for legitimate trial-related reasons." Batson, at 90 (White, concurring). Consequently, Mr. Ford is now entitled to an evidentiary hearing where the prosecutor will be required to give reasons for his exercise of peremptory challenges---if such reasons can be

proffered.[2]

This court should not now say that Mr. Ford's challenge to the use of peremptories was both too early and too late. To allow this claim to go unreviewed because there was no additional objection when peremptories were employed before the jury was sworn is to ignore completely the purpose behind contemporaneous objection requirements and the circumstances of this case and issue.

It is the rule in Georgia, as elsewhere, "that objections to irregularities must ordinarily be made at a time when they may be remedied, or they are waived." Castell v. State, 301 S.E.2d 234 (Ga. 1983). At Mr. Ford's trial, the trial judge was specifically requested by defense counsel to make the prosecutor give reasons when he peremptorily struck black jurors. (10/12/84 Pre-Trial T. 161). The trial court ruled that no reasons would be required of the prosecutor for his exercise of peremptory challenges. At trial, when the prosecutor even offered to give reasons for his use of peremptories, the trial court again declined any

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2. Over three years have now gone by since the jury was struck in this case, and it is doubtful whether credible, legitimate reasons can now be proffered to justify exclusion of 90% of the black jurors through peremptories---if any legitimate reasons ever existed. This court should therefore summarily reverse Mr. Ford's conviction and sentence. See e.g., Mincey v. State, 349 S.E.2d 1, 180 Ga.App. 263 (Ga.App. 1986). Additional delay on the question of why blacks were struck would certainly make impossible any credible explanation on why peremptories were exercised in the apparent racially discriminatory manner.

showing on this question. (T. 267-268). The trial court had every opportunity to remedy the alleged error in this case and on each occasion declined to do so. The trial court did not act unreasonably under existing law, but the law has changed and a showing must now be made on the prosecutor's use of peremptories.

There is no credible argument that this Appellant was attempting to "sandbag" the court on this issue or deliberately withheld this claim to make a finding of procedural bar appropriate by this court. The trial counsel did everything that could be reasonably done to get the court to address this issue adequately. This court's rulings in State v. Sparks, 355 S.E.2d 658, 257 Ga. 97 (Ga. 1987), and Riley v. State, 355 S.E.2d 66, 257 Ga. 91, 94 (Ga. 1987), which came over two years after the jury selection in this case, cannot support the application of a procedural bar to Mr. Ford's challenge.

The rule announced in Sparks was an expressly prospective one. "[H]ereafter, any claim under Batson should be raised prior to the time the jurors selected to try the case are sworn." Sparks, 355 at 659, (emphasis added). In addition to the fact that the defense counsel in this case had objected to the prosecutor's anticipated racially discriminatory use of peremptories and requested that the prosecutor give reasons before the jury was sworn, the considerations that led to the court reaching the merits of Sparks' claim are even greater in this case. This

court appropriately afforded Sparks a remand on his Batson claim "because there have been no judicial guidelines regarding the time and manner in which such a claim is to be presented. . . ." Sparks, at 659.

This court's holding in Riley is similarly no precedent for declining to reach the merits of Mr. Ford's claim since Riley presumably never objected to the discriminatory use of peremptories pre-trial or requested that the prosecutor give reasons for striking blacks before the jury was sworn as was done by Mr. Ford. Appellant would also note that jury selection in Riley took place after the United States Supreme Court's decision in Batson, and the contours of a Batson challenge were clearer.

Additionally, as is noted by Justice Gregory in his dissent, the application of a procedural bar in this case on this issue cannot be supported as a "firmly established and regularly followed state practice" that should bar implementation of federal constitutional rights. James v. Kentucky, 466 U.S. 341 (1984); Hathorn v. Lovorn, 457 U.S. 255, 262-263 (1982).[3]

Even assuming that trial counsel did not satisfy procedural requirements, the application of a procedural bar under the

3. Even assuming the existence of a valid state bar on this question in this case, there would exist adequate "cause and prejudice" to excuse such a default for the purposes of federal habeas review. See, Engle v. Issac, 456 U.S. 107 (1982); Francis v. Henderson, 425 U.S. 536 (1976).

circumstances of this case on this issue is simply without purpose. To be legitimate, a state procedural rule must be "clearly announced to defendant and counsel." Henry v. Mississippi, 379 U.S. 443, 448 n.3 (1965); Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986). "Giving effect to the contemporaneous objection rule for its own sake would be to resort to an arid ritual of meaningless form." Henry, 379 U.S. at 449.

It is also particularly discouraged in a capital case. This court has "been less stringent in [its] enforcement of the contemporaneous objection rule as to error that may affect a sentence of death because [it] must under [Georgia law] determine whether the sentence was imposed as a result of passion, prejudice or other arbitrary factor." Castell, 301 S.E.2d at 246. See also, Gilreath v. State, 279 S.E.2d 650, 670 (Ga. 1983); Potts v. State, 243 S.E.2d 510, 523 (Ga. 1978); Conner v. State, 303 S.E.2d 266, 275 (Ga. 1983). Consequently, a procedural bar cannot be appropriately applied in this case.

CONCLUSION

This court should grant Mr. Ford's motion for rehearing and order full briefing and argument, or in the alternative remand this case back to the trial court for an evidentiary hearing on the prosecutor's racially discriminatory use of peremptories, or summarily reverse the conviction and sentence.

Respectfully submitted,

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COUNSEL FOR JAMES FORD

a complete and well considered opinion to this Court.

"1. Standard 4

"With respect to Standard 4, the *Brooks* case, supra, establishes that an attorney-client relationship is not necessary in order to find that an attorney was acting in a professional capacity. Assuming there was no attorney-client relationship between Respondent and the Jones Estate, the Board concludes that Respondent was nevertheless acting in a professional capacity. Respondent probated the Estate in the Probate Court of Richmond County. It was the policy of the Probate Court Judge that any person offering documents for probate must employ counsel. Respondent did not employ independent counsel to perform this function for the estate. In addition, Respondent's law firm, Harrison & Roper, appears on all pleadings regarding the Estate of Gwendolen Ellis Jones. Respondent submitted statements for professional services to the Estate. Finally, Respondent retained the C & S Bank as his agent to perform nonlegal services for the Estate.

"Standard 4 also requires a finding that the attorney's conduct involved dishonesty, fraud, deceit or wilful misrepresentation. Based on the findings that Respondent failed to account to the Estate of Gwendolen Ellis Jones for approximately $78,000, and Respondent converted these funds to his own use, the Board concludes that Respondent's conduct was dishonest, fraudulent and deceitful in violation of Standard 4.

"2. Standard 65

"Count Two of the Formal Complaint also charges Respondent with a violation of Standard 65 on the theory that Respondent failed to account for property of the Estate of Gwendolen Ellis Jones held in a 'fiduciary capacity'. This theory is mentioned in *footnote one* (1) of the *Dowdy* opinion, supra. In his Answer to the Formal Complaint, Respondent contends that he is not subject to discipline because he acted in his capacity as an administrator, not as an attorney. As administrator for the Estate of Gwendolen Ellis Jones, Respondent owed a fiduciary responsibility to the Estate. This responsibility was breached when Respondent failed to account for Estate funds and converted the funds to his own use. These actions on the part of a lawyer serving in a fiduciary capacity are just as reprehensible as if the lawyer had been handling the money of a client to whom he would have the same fiduciary responsibility. The Board therefore concludes that Respondent breached his fiduciary duty to the Estate by failing to account to the Estate for funds entrusted to him, in violation of Standard 65 of Bar Rule 4-102."

The Board recommended that Respondent be disbarred from the practice of law in the State of Georgia. We follow that recommendation. It is ordered that D. Landrum Harrison be stricken from the role of attorneys allowed to practice law in this state.

It Is So Ordered.

All the Justices concur.

v.

The STATE.

No. 42154.

Supreme Court of Georgia.

Oct. 29, 1985.

Defendant was convicted in the Coweta Superior Court, William F. Lee, Jr., J., of armed robbery, rape, kidnapping with bodily injury, burglary and murder, and was sentenced to death, and he appealed. The

Supreme Court, Smith, J., held that: (1) showing that large percentage, but not all, of black prospective jurors were peremptorily struck by prosecution failed to establish systematic exclusion of black jurors; (2) trial court did not abuse its discretion by denying defendant's motion for sequestered voir dire; (3) trial court did not err by refusing to grant defendant extra peremptory strikes; (4) trial court did not err in refusing to change venue; (5) trial court did not err by finding confession to have been voluntary; (6) practice of death qualification of jurors is constitutional; (7) neither trial attorney's performance nor prosecutor's improper argument justified reversal; and (8) death sentence was proper.

Affirmed.

1. Burglary ⇐41(1)
Homicide ⇐250
Kidnapping ⇐5
Rape ⇐51(1)
Robbery ⇐24.1(3)

Evidence was sufficient to support conviction of defendant of armed robbery, rape, kidnapping with bodily injury, burglary and murder.

2. Jury ⇐33(5.1)

Showing that large percentage, but not all, of black prospective jurors were peremptorily struck by prosecution failed to establish systematic exclusion of black jurors, leading to general condition that black citizens did not serve on criminal trial juries in the circuit.

3. Criminal Law ⇐706(4)

State was constitutionally required to reveal to defendant agreement reached with codefendant for his testimony.

4. Jury ⇐131(13)

Trial court did not abuse its discretion by denying defendant's motion for sequestered voir dire.

5. Jury ⇐136(4)

Trial court did not err by refusing to grant defendant extra peremptory strikes, in addition to the 20 authorized. O.C.G.A. § 15-12-165.

6. Criminal Law ⇐126(1)

Even though almost all prospective jurors had heard at least something about the case, trial court did not err in refusing to change venue, in view of limited amount of prejudicial pretrial publicity and low percentage of veniremen excused for bias, prejudice or a fixed opinion.

7. Criminal Law ⇐531(3)

Trial court did not err by finding confession to have been voluntary, in view of lack of any evidence of threats or promises by officers or requests for attorney by defendant.

8. Jury ⇐33(2.1)

Practice of death qualification of jurors is constitutional.

9. Criminal Law ⇐641.13(1)

Bench mark for judging any claim for ineffectiveness must be whether counsel's conduct so undermined proper functioning of adversarial process that trial cannot be relied on as having produced just result. U.S.C.A. Const.Amend. 6.

10. Criminal Law ⇐641.13(1)

In order to prevail on ineffectiveness claim, convicted defendant must show that counsel's performance was deficient, i.e., that counsel's performance was not reasonable under all circumstances, and that this deficient performance prejudiced defense, i.e. that there was reasonable probability that, but for counsel's unprofessional errors, result of proceeding would have been different. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⇐641.13(1), 1134(2)

Defendant's failure to establish either performance or prejudice component of ineffectiveness claim results in denial of claim, and reviewing court need not address both components if defendant makes insufficient showing on one, nor must components be addressed in any particular order. U.S.C.A. Const.Amend. 6.

12. Criminal Law ⇐641.13(7)

Defendant was not prejudiced by any failure of his trial attorney to offer "vast wealth of data now available" on subject of constitutionality of death penalty law. U.S.C.A. Const.Amend. 6.

13. Criminal Law ⇐641.13(2)

Defendant was not prejudiced by trial counsel's failure to support with evidence his challenge to practice of death-qualifying jury. U.S.C.A. Const.Amend. 6.

14. Criminal Law ⇐641.13(2)

Trial counsel's effort to change venue was not deficient, and defendant failed to establish any reasonable possibility that, had suggested additional action been taken, change of venue would have been granted. U.S.C.A. Const.Amend. 6.

15. Criminal Law ⇐641.13(2)

There was nothing in implied malice instruction to which trial counsel could have objected and thus counsel's failure to object to instruction did not deprive defendant of effective assistance of counsel. O.C.G.A. § 16-5-1(b).

16. Criminal Law ⇐306

Permissive presumption is not unconstitutional so long as it is rational.

17. Criminal Law ⇐641.13(2)

Trial counsel was not remiss in failing to object to intent instruction which was not reasonably susceptible of interpretation that relieved prosecution of its burden of proving intent beyond reasonable doubt or otherwise undermined fact-finding responsibility of jury. U.S.C.A. Const.Amend. 6.

18. Criminal Law ⇐641.13(2)

Trial counsel's failure to object to proper charge on conspiracy did not show ineffectiveness. U.S.C.A. Const.Amend. 6.

19. Criminal Law ⇐641.13(2)

Trial counsel was not ineffective for failing to request charge on prior inconsistent statements as substantive evidence, where jury, absent instructions to the contrary, surely considered substantively all the evidence presented to it. U.S.C.A. Const.Amend. 6.

20. Criminal Law ⇐286

Special plea of incompetence requires determination of whether defendant at time of trial is capable of understanding nature and object of proceedings against him and is capable of assisting his attorney with his defense.

21. Criminal Law ⇐641.13(5)

Defendant failed to meet his burden of establishing deficiency or prejudice in failure of trial counsel to file special plea or to move for additional expert assistance on issue of his competence, where there was no indication that defendant did not understand nature and object of proceedings or was incapable of assisting his attorney. U.S.C.A. Const.Amend. 6.

22. Criminal Law ⇐641.13(6)

Defendant failed to establish that trial counsel's presentation or failure to present evidence of defendant's psychotic episodes was deficient, where defendant failed to establish that he was subject to such episodes. U.S.C.A. Const.Amend. 6.

23. Criminal Law ⇐641.13(2), 713

Permissible arguments, no matter how effective, do not contravene fundamental fairness; likewise, failure to object to permissible arguments cannot establish deficient attorney performance. U.S.C.A. Const.Amend. 6.

24. Criminal Law ⇐1037.1(1)

Where prosecutor argues improperly and no objection is interposed, whether reversal is required depends upon evaluation of prejudice that is undertaken in essentially identical manner whether improper arguments are considered directly or in context of ineffectiveness claim.

25. Criminal Law ⇐641.13(2)

Trial counsel's failure to object to prosecutor's comment, during opening statement, that evidence was "horrible and gruesome" did not constitute ineffective assistance, where this description was accurate. U.S.C.A. Const.Amend. 6.

26. Criminal Law ⇐641.13(2)

Trial counsel was not ineffective in failing to object to prosecutor's comment that he wished to show a "video tape of what happened," but since he could not, he would "try to explain it" in such a way that "if you will try to imagine in your minds as if you're watching television * * * you'll see how the case is going to be presented to you and why it's presented in a certain way," where there was nothing objectionable in such comment. U.S.C.A. Const. Amend. 6.

27. Criminal Law ⇐719(3)

Although expressions of personal opinion by attorney are objectionable and should be avoided, nonetheless, when evidentiary facts supporting such conclusion are cited and conclusion follows naturally from such facts, mere use of phrase "I think * * *" as opposed to "I contend * * *" or "I submit * * *" or "The evidence shows * * *," is unlikely to have strong impact on jury's independent evaluation of evidence.

28. Criminal Law ⇐641.13(2)

Although trial counsel should have objected to prosecutor's expressions of personal opinion and misstatement of law in his closing argument, there was no reasonable probability that the exclusion of such arguments would have changed result at guilt-innocent phase of trial. U.S.C.A. Const.Amend. 6.

29. Criminal Law ⇐713

Although there are other legitimate sentencing concerns besides retribution, prosecutor is under no obligation to argue all of them.

30. Criminal Law ⇐723(1)

Prosecutor did not err by noting obvious fact that victim was gone and would never be here again.

31. Criminal Law ⇐713

Prosecutor did not err by arguing: "[O]ur government has determined that the death penalty is appropriate and necessary in certain cases and should be provided * * * It's up to you to decide if this is that type of case that deserves the death penalty."

32. Criminal Law ⇐723(3)

Prosecutor's argument that law and order depended upon confidence of citizenry that criminals would receive punishment they deserved was not improper.

33. Criminal Law ⇐723(1, 2)

Prosecutor committed no impropriety by arguing that jury was commanded "to do what is right and what is just"; by following his discussion of heinousness of crime with dramatic assertion that victim would be "in there" with the jury, asking for justice; or by concluding "By God we draw the line somewhere and this is it folks. Enough is enough and we draw the line. You say it for [the victim], say it for all of us, enough is enough. It's got to stop. Thank you."

34. Criminal Law ⇐723(1), 1171.1(6)

Prosecutor's argument, at sentencing phase, confusing forgiveness with mercy, in arguing that jury had no right to be merciful, was legally incorrect, but there was no reasonable probability that, but for improper argument, defendant would have received life sentence.

35. Criminal Law ⇐1205

Just as retribution is appropriate justification for imposing capital sentence, so is mercy an acceptable sentencing rationale.

36. Criminal Law ⇐713

Prosecutor is entitled to urge vigorously that death sentence is appropriate punishment in case at hand.

37. Criminal Law ⇐713

Prosecutor is entitled to urge vigorously that mercy is inappropriate in case at hand.

38. Homicide ⇐354

Evidence supported jury's finding in regard to aggravating circumstance that offense of murder was committed while defendant was engaged in commission of additional capital felonies of rape, kidnapping with bodily injury and armed robbery. O.C.G.A. § 17-10-30(b)(2).

Cite as 335 S.E.2d 567 (Ga. 1985)

39. Homicide ⇐354

Finding of aggravating circumstance that "the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture or depravity of mind" was supported by evidence that victim was kidnapped, raped, stuffed into trunk of her own car, driven around for several hours, hit on the head with metal road sign and pushed into pond where she drowned. O.C.G.A. §§ 17-10-30(b)(7), 17-10-35(c)(2).

40. Criminal Law ⇐1208.1(4)

Sentence of death was not imposed under influence of passion, prejudice or other arbitrary factor. O.C.G.A. § 17-10-35(c)(1).

41. Criminal Law ⇐983

Defendant's death sentence was not disproportionate to life sentence received by codefendant, where evidence tended to show that defendant was the more culpable, that he, not codefendant, drove car, raped victim, hit her with road sign, left car out of gear prior to pushing it into pond, and got the money.

42. Homicide ⇐354

Death sentence imposed on defendant convicted of armed robbery, rape, kidnapping with bodily injury, burglary and murder was neither excessive nor disproportionate to sentences imposed in similar cases generally. O.C.G.A. § 17-10-35(c)(3).

Nelson Jarnagin, Harvey & Jarnagin, Atlanta, for James A. Ford, Jr.

Art Mallory, Dist. Atty., LaGrange, Michael J. Bowers, Atty. Gen., Atlanta, for the State.

SMITH, Justice.

This is a death penalty case. Appellant, James A. Ford, was convicted in Coweta County of armed robbery, rape, kidnapping with bodily injury, burglary, and murder. The case is here on direct appeal, for review under the Unified Appeal Procedure (252 Ga. A-13 et seq.), and for the sentence review required by OCGA § 17-10-35.[1] We affirm.

FACTS

The victim, Sarah Dean, managed the J & L gas station in Newnan. She usually began work at 6:00 a.m. Shortly after 5:00 a.m. on March 1, 1984, a burglar alarm went off at the station. Police responding to the call found the front door unlocked but nothing else out of the ordinary; however, attempts to contact Mrs. Dean were unsuccessful. Pending the arrival of the district supervisor from Marietta, the door was re-locked and the police left.

Soon afterwards, an employee of a neighboring business observed a small black male exiting J & L by a window, and contacted the police. Acting on information obtained from his mother, police questioned Steve Cox, who was found to be in possession of keys to the J & L station. Cox implicated Ford, and, shortly before 2:00 p.m., a warrant was obtained for the latter's arrest.

At approximately 3:00 p.m., Sarah Dean's automobile was located, submerged to its roof in a pond. After pulling the car out with a wrecker, police used the keys (which were in the ignition) to open the trunk, where they discovered the body of Sarah Dean.

Three hours later, Ford was arrested, after a high-speed automobile chase. He was found to be in possession of over $2000.

Ford subsequently gave a written confession, which can be summarized as follows: He and Steve Cox, having decided to get some money to pay a fine, arrived at J & L just as the victim was preparing to leave, and forced their way into her car. Ford drove to a secluded area, where they un-

1. The jury returned its verdict as to sentence on October 25, 1984. A motion for new trial was filed November 26, 1984, amended on January 7, 1985, heard January 18, 1985, and denied February 19, 1985. A notice of appeal was filed March 14, 1985, and the record was docketed in this court on March 29, 1985. The case was orally argued June 4, 1985.

dressed the victim and "had sex" with her. Afterwards, they put her in the trunk and drove around—buying marijuana with money they found in the victim's purse; driving to Atlanta, where Ford visited a girlfriend; and returning to Newnan, where they spent an hour in a tavern. Next, they drove to a more secluded area. Ford opened the trunk and hit the victim on the head with a road sign. Finally, they pushed the car into a pond (with the victim still in the trunk). After disposing of the victim, the two returned to J & L on foot and used the victim's keys to enter the station. Ford got "a large amount of money out of the cabinet," and left by the front door when the police arrived.

Cox testified at trial. His testimony was generally consistent with Ford's confession, except he claimed that only Ford raped the victim. In addition, he testified that when they first entered the victim's car, Ford held a butcher knife to the victim's neck; that Ford threatened to kill the victim during the rape and again while they were at the tavern; that Ford responded to the victim's plea for mercy by telling her to "shut up;" and that as the car rolled into the pond, Cox could hear the victim beating on the trunk-lid.

Ricky Wright testified that on the morning of March 1 he and Ford went shopping in Atlanta. En route, Ford admitted to Wright that he had burglarized J & L, raped the woman who managed it, put her in the trunk of her car and pushed the car into a pond. According to Wright, Ford was laughing and smiling as he described the crime. Wright testified that Ford had a large sum of money and gave Wright $150.

An autopsy established that the victim had drowned. Serological examination of vaginal swabbings positively established that sexual intercourse had recently occurred. Hairs found on the victim were consistent with having come from Ford (and inconsistent with having come from Cox).

[1] The evidence overwhelmingly establishes Ford's guilt, and, therefore, more than suffices to meet the standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

ENUMERATIONS OF ERROR

[2] 1. In his 2nd enumeration, Ford contends that the prosecutor's use of peremptory strikes to remove 9 of 10 possible black jurors denied Ford his right to a jury comprised of a fair cross-section of the community. (One black served on the jury.) Ford has shown only that a large percentage—but not all—of black prospective jurors were peremptorily struck by the prosecution in *this* case. "He has failed to establish a systematic exclusion of black jurors, leading to a general condition that black citizens do not serve on criminal trial juries in the circuit." *Moore v. State*, 254 Ga. 525, 525(2(b)), 330 S.E.2d 717 (1985). Accordingly, we find no error here.

[3] 2. Prior to trial, the state reached an agreement with Steve Cox whereby, in exchange for his truthful testimony, he would be prosecuted only for armed robbery and burglary and the state would recommend "life plus 20," or, in other words, the maximum sentences for these crimes. The state, of course, was constitutionally required to and did reveal this information to Ford. *Owens v. State*, 251 Ga. 313(1), 305 S.E.2d 102 (1983).

When Cox testified, the state lost no time in addressing this subject. When the state asked Cox what sentence he was going to get, Cox answered, "Six years." As the state prepared to refresh his recollection, the court interrupted to state: "Let me tell you right here and now you're not going to get any six years, do you understand that?" The state then proceeded to establish Cox's understanding that the recommended sentence was going to be life plus 20 years, and not 6 years.

In his 3rd enumeration of error, Ford contends that the court's comment was an improper expression of opinion. See OCGA

§ 17-8-57.[2] We need not determine whether this code section actually was violated, inasmuch as Ford neither objected nor moved for a mistrial. *State v. Griffin*, 240 Ga. 470, 241 S.E.2d 230 (1978). We note, however, that Ford does not, even now, contest the truth of the court's comment, see *Abbott v. State*, 91 Ga.App. 380(3), 85 S.E.2d 615 (1955), or contend otherwise than that regardless of the court's comment, the state had a constitutional duty to correct Cox's misconception, see *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and if, as a result, Cox's credibility was adversely affected, Ford plainly was benefitted thereby.

[4] 3. The trial court did not abuse its discretion by denying Ford's motion for sequestered voir dire. *Finney v. State*, 253 Ga. 346(2), 320 S.E.2d 147 (1984). Enumeration 5 is without merit.

[5] 4. Regarding Ford's 6th enumeration, we find that the trial court did not err by refusing to grant Ford extra peremptory strikes, in addition to the 20 authorized by OCGA § 15-12-165.

[6] 5. Enumeration 7 complains of the trial court's refusal to change venue. Although almost all of the prospective jurors had heard at least something about the case, in view of the limited amount of prejudicial pre-trial publicity shown in this case, and the low percentage of veniremen excused for bias, prejudice or fixed opinion (5 of 60 or 8%),[3] the trial court did not err. *Devier v. State*, 253 Ga. 604(4), 323 S.E.2d 150 (1984); *Waters v. State*, 248 Ga. 355(1), 283 S.E.2d 238 (1981).

6. After his arrest, Ford gave two statements. The trial court excluded the second statement but ruled that the first statement was voluntary and admissible.[4] In his 8th enumeration, Ford complains of the court's refusal to exclude the first statement.

[7] Ford was advised of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and signed a form waiving those rights after officers read the form and explained each portion of the form as they went along. In view of the lack of any evidence of threats or promises by the officers, or of a request for an attorney by Ford, the court did not err by finding the confession to have been voluntary.

[8] 7. We adhere to our position that the practice of death-qualification of jurors is not unconstitutional. *Mincey v. State*, 251 Ga. 255(2), 304 S.E.2d 882 (1983), despite the Eighth Circuit Court of Appeals' holding to the contrary. See *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir.1985). We agree with the Missouri Supreme Court that *Grigsby* is contrary not only to the overwhelming weight of state and federal authority but also to *Wainwright v. Witt*, 469 U.S. ——, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). *State v. Nave*, 694 S.W.2d 729 (Mo. 1985). Therefore, we find enumeration 9 to be without merit.

8. After trial, Ford's family retained a private attorney to represent him in the post-conviction proceedings, including the motion for new trial and the appeal. The court-appointed trial attorney was dismissed. Ford contends in his 4th enumeration of error that his trial attorney rendered ineffective assistance of counsel, particularly at the sentencing phase of the trial.

[9, 10] "The bench mark for judging any claim of ineffectiveness must be

2. OCGA § 17-8-57 provides: "It is error for any judge in any criminal case, during its progress or in his charge to the jury, to express his opinion as to what has or has not been proved or as to the guilt of the accused ..."

3. In addition, 3 jurors who underwent voir dire were excused for prejudice or bias for or against the death penalty, and one was excused because she had served on the grand jury.

4. The court's original pre-trial ruling on this issue was insufficiently specific. See Pre-trial Transcript, October 12 hearing, p. 211; *Cofield v. State*, 247 Ga. 98(4), 274 S.E.2d 530 (1981). However, the court subsequently clarified its ruling. See Trial Transcript p. 350; *Parks v. State*, 254 Ga. 403(1), 330 S.E.2d 686 (1985).

whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, ——, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). In order to prevail on an ineffectiveness claim, a convicted defendant must show (1) "that counsel's performance was deficient," i.e., that counsel's performance was not reasonable under all the circumstances, and (2) that this "deficient performance prejudiced the defense," i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at ——, 104 S.Ct. at 2064. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Ibid.

[11] The complaining defendant must make both showings. His failure "to establish either the performance or the prejudice component results in the denial of his Sixth Amendment claim." *King v. Strickland*, 748 F.2d 1462, 1463 (11th Cir.1984). A reviewing court need not "address both components if the defendant makes an insufficient showing on one," *Washington v. Strickland*, supra at ——, 104 S.Ct. at 2069, nor must the components be addressed in any particular order. Ibid.

With the foregoing in mind, we shall now undertake to address the various acts and omissions allegedly demonstrating ineffective representation. For reasons discussed below, we consider this enumeration of error together with enumeration 1, in which Ford complains of the prosecutor's argument at the sentencing phase of the trial.

(a) Ford claims that his trial attorney, Arthur Edge IV, should have offered the "vast wealth of data now available" on the subject of the constitutionality of Georgia's death penalty law, and claims that "[c]ompetent counsel would have known that this very issue is currently awaiting *en banc* decision by the United States Court of Appeals for the Eleventh Circuit in *McCleskey v. Zant* ..."

[12] In view of the decision since rendered by the *en banc* Eleventh Circuit on this issue, Ford clearly was not prejudiced by any omission here. See *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir.1985) (affirming the denial of habeas relief on the ground of racial bias in the administration of the death penalty, and reversing the grant of habeas relief on another ground).

[13] (b) Nor do we find any possible prejudice from counsel's failure to support with evidence his challenge to the practice of death-qualifying the jury. See Division 7, supra.

(c) Ford claims that attorney Edge made an insufficient effort to change venue. He asserts: "Competent counsel would have engaged an expert, or experts, to analyze the pretrial publicity; and to conduct a survey of the community and/or the prospective jurors to determine community sentiment. Counsel could have called numerous witnesses—being a resident of the area—to attest to the way knowledge and gossip circulate in a community of less than 40,000 people."

That counsel could have taken action that he did not does not necessarily render his performance deficient. Ford does not show how an expert analysis of pretrial publicity could have accomplished any more than the introduction in evidence of whatever publicity existed. Nor has he explained why competent counsel could not reasonably assume that the voir dire of prospective jurors would establish community sentiment at least as well as a "survey of the community and/or the prospective jurors." (In particular, it would seem that the voir dire *is* a survey of the prospective jurors.)

[14] We find no deficiency here, and, in addition, Ford has not established any reasonable probability that, had the suggested additional action been taken, a change of venue would have been granted.

(d) At the guilt-innocence phase of the trial, the court charged (inter alia):

"Malice *may be implied* where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart." (Emphasis supplied.)

"[Intent] may be inferred from the proven circumstances or by acts and conduct or it *may be presumed* when it is the natural and necessary consequence of the act." (Emphasis supplied.)

Attorney Edge neither objected to these instructions, nor reserved any objections to them. See *Rivers v. State*, 250 Ga. 903, 309, 298 S.E.2d 1 (1982). Ford now claims that competent counsel would have detected the "clear *Sandstrom* problems" with these instructions, and would have objected. See *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

[15] We find nothing objectionable in the implied malice instruction. Compare OCGA § 16-5-1(b); *Lamb v. Jernigan*, 683 F.2d 1332, 1340 (11th Cir.1982).

[16] As to the intent instruction, we have previously stated our preference for charges stated in terms of "inferences" rather than presumptions (except as to the defendant's sanity and, of course, his innocence). See, e.g., *Rose v. State*, 249 Ga. 628, 631, 292 S.E.2d 678 (1982). "[T]he term 'inference' has tended to be used more frequently [than the term 'presumption'] for evidentiary devices that are permissive in nature ..." *Lamb v. Jernigan*, supra at 1335-36 (fn. 4). Nevertheless, a "presumption" is not necessarily mandatory, and a permissive presumption is not unconstitutional so long as it is rational. *Ulster County Court v. Allen*, 442 U.S. 140, 157, 99 S.Ct. 2213, 2224-25, 60 L.Ed.2d 777 (1979).

[17] The intent instruction here "was not reasonably susceptible of an interpretation that relieved the prosecution of its burden of proving intent beyond a reasonable doubt or otherwise undermined the factfinding responsibility of the jury." *Lamb v. Jernigan*, supra at 1340 (addressing an intent instruction identical to the one given in this case).

From the foregoing, it can readily be seen that attorney Edge was not remiss in failing to object to the above charges and that the defense was not prejudiced by the failure to object.

[18] (e) There likewise being no error in the court's charge on conspiracy, *Anderson v. State*, 153 Ga.App. 401(3), 265 S.E.2d 299 (1980), Edge's failure to object to the charge does not show ineffectiveness of counsel.

[19] (f) We fail to see how Edge can be condemned for failing to request a charge on prior inconsistent statements as substantive evidence. Absent instructions to the contrary, the jury surely regarded substantively *all* the evidence presented to it. See *Gibbons v. State*, 248 Ga. 858, 286 S.E.2d 717 (1982).

(g) Ford claims that attorney Edge should have obtained an independent psychiatric evaluation of the defendant, and should have filed a special plea challenging his competency.

Ford was evaluated prior to trial, by Dr. Donald P. Grigsby, Ph.D., chief of forensic services at the West Georgia Central Regional Hospital. Dr. Grigsby's report, included in the record, attached to the report of the trial judge (see OCGA § 17-10-35(a)), reads, in part, as follows:

"James Ford has never been a prior patient at this hospital or at Central State Hospital; he did spend one year at the Milledgeville Youth Detention Center between the age of 15 and 16. James Ford has no record of prior psychiatric treatment in the State of Georgia.

"James Ford's current mental results are as follows: He is an 18 year old black male that looks his stated age ... Numerous scars are located on his right forearm; otherwise, no remarkable body/facial characteristics/asymmetries were noted. His eye contact was fair. No tremors or shakes or other psychomotor problems were noted. Vision and hearing appeared normal. His speech was forceful and short and to the point; he was relevant and coherent. Posture and gait were normal. His behavior during testing was attentive, he was coop-

erative but guarded and acted like a tough man. No impairment of memory function was seen. He was in touch with reality and his thoughts progressed from stimulus to logical conclusion. No abnormal psychiatric content of thought was noted. His affect was appropriate and flat; his mood was somewhat defiant and macho. He was oriented to time, person and place. His intellect appeared dull and his judgment slightly impaired as measured with the Mental Status Exam.

"Neurological screening was negative at this time. Emotional indicators on the Bender would suggest some anxiety.

"Intellectual assessment with the WAIS-R produced a Full Scale IQ of 73, placing him within the borderline range of intelligence.' This is believed to be a valid assessment of his current level of functioning.

"Objective personality assessment was attempted but not successfully completed with the short form MMPI. The test was administered to James Ford; however, the results were invalidated by his 'faking sick.' This examiner did not detect the presence of any psychiatric disorder.

"It is the professional opinion of this examiner that James Ford is both legally competent to stand trial and criminally responsible for his behaviors. He is aware of the charges against him, he understands the nature of the judicial process, and he is able to consult with his attorney in building his defense. In regards to his criminal responsibility, it is the professional opinion of this examiner that he did and does know right from wrong and at the time of the alleged crime there was no evidence, whatsoever, for a delusional compulsion."

[20, 21] We do not have, on this record, any testimony from Edge as to why he did not move for an independent evaluation, or file a special plea of incompetence. Thus, we can only speculate as to the extent to which Edge might have relied upon, for example, his own observations of the defendant, or other matters, in addition to the above report. In any event, a special plea of incompetence requires "a determination of whether the defendant at the time of the trial is capable of understanding the nature and object of the proceedings against him and is capable of assisting his attorney with his defense." *Brown v. State*, 250 Ga. 66, 70, 295 S.E.2d 727 (1982). There being no indication in the record that Ford did not understand the nature and object of the proceedings or was incapable of assisting his attorney, Ford has failed to meet his burden of establishing deficiency or prejudice in the failure of trial counsel to file a special plea or to move for additional expert assistance on this issue. Compare *Lindsey v. State*, 254 Ga. 444, 330 S.E.2d 563 (1985).

(h) In a related vein, Ford contends that "crucial" mitigating evidence was "either not presented or was presented in a superficial manner which could not have informed the sentencing jury of its importance or weight."

Dr. James Thomas, a pediatrician, testified on behalf of the defense at the hearing on the motion for new trial. On November 8, 1973, when Ford was eight years old, Dr. Thomas diagnosed him as being hyperactive. He prescribed Ritalin, described in the Physician's Desk Reference (PDR) (1985 Edition) as a "mild central nervous system stimulant." Id. at 865. Ford took Ritalin (during the school year) for several years; Dr. Thomas last prescribed the drug on January 17, 1977 (but it was possibly refilled for a limited time afterwards).

Ford's mother testified at the sentencing phase of the trial that "he was a hyperactive kid." However, no evidence was presented at trial that Ford had taken Ritalin for this condition.

Ford calls our attention to the following warning in the PDR (p. 865):

"Drug Dependence

"Ritalin should be given cautiously to emotionally unstable patients, such as those with a history of drug dependence or alcoholism, because such patients may increase dosage on their own initiative.

"Chronically abusive use can lead to marked tolerance and psychic dependence with varying degrees of abnormal behavior. Frank psychotic episodes can occur, especially with parenteral abuse.[5] Careful supervision is required during drug withdrawal, since severe depression as well as the effects of chronic overactivity can be unmasked. Long-term follow-up may be required because of the patient's basic personality disturbances."

Ford argues: "Clearly, evidence that Appellant, due to his prolonged use of Ritalin, was subject to psychotic episodes was evidence which would have carried a great deal of weight with his sentence. The state's case on punishment would have been effectively rebutted by a showing of another explanation for Appellant's behavior besides that he was evil and malicious."

This argument is based upon a misreading of the PDR. The quoted warning does not address itself to normal usage of Ritalin, even if "prolonged." It addresses, instead, "[c]hronically abusive use."

[22] Not only has Ford not shown that he actually suffered psychotic episodes, he has presented no evidence of chronically abusive use which would have the potential to cause such episodes. Thus, Ford has failed to establish that he was subject to psychotic episodes due to his use of Ritalin, and, therefore, has failed to establish that Edge's performance in this respect was deficient.

(i) Finally, Ford complains of Edge's failure to object to allegedly improper argument by the state, at both phases of the trial. In addition, he contends in his first enumeration of error that the prosecutor's improper closing argument at the sentencing phase of the trial rendered the imposition of sentence fundamentally unfair, citing *Hance v. Zant*, 696 F.2d 940 (11th Cir.1983).

We begin our analysis of these complaints by observing that the portion of *Hance v. Zant* addressing prosecutorial argument has been overruled. See *Brooks v. Kemp*, 762 F.2d 1383, 1399 and 1404–1405 (11th Cir.1985); *Tucker v. Kemp*, 762 F.2d 1480, 1486 (11th Cir.1985). Compare *Conner v. State*, 251 Ga. 113(5), 303 S.E.2d 266 (1983) (expressing our disagreement with *Hance*). We find the correct approach to be as follows.

[23] First, permissible arguments, no matter how effective, do not contravene fundamental fairness; likewise, a failure to object to permissible arguments cannot establish deficient attorney performance.

[24] Second, where the prosecutor argues improperly and no objection is interposed, whether reversal is required depends upon an evaluation of prejudice that is undertaken in an essentially identical manner whether the improper arguments are considered directly or in the context of an ineffectiveness claim. Compare *Strickland v. Washington*, supra (prejudice is established by a showing that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"), with *Brooks v. Kemp*, supra (applying *Strickland* "reasonable probability" test in context of improper prosecutorial argument), and *Conner v. State*, supra (where argument not objected to, we determine only whether impropriety was so egregious that death sentence was imposed as a result of passion, prejudice or other arbitrary factor).

Thus, our evaluation of Ford's direct attack upon the prosecutor's sentence-phase argument, as well as his indirect attack upon the prosecutor's argument in general, via his ineffectiveness claim, may be undertaken by determining, first, which (if any) portions of the state's argument were improper, and, second (if improprieties are

5. Ford misquotes this term as "parental" abuse, instead of "parenteral" abuse. The adjective parenteral means: "1. outside the intestine 2. brought into the body through some way other than the digestive tract, as by subcutaneous or intravenous injection." Webster's New World Dictionary of the American Language, 2nd College Edition 1970. Ritalin, offered only in tablet form, is properly taken orally.

discovered), whether the improper arguments were so egregious as to require a new trial.

(i-1) The guilt-innocence phase.

[25] Ford complains that during the prosecutor's opening statement the evidence was described as "horrible and gruesome." Since this was an accurate description, we find nothing objectionable about it, despite Ford's contention that it was argumentative and inflammatory.

[26] Nor do we find anything objectionable in the prosecutor's comment that he wished he could show a "video tape of what happened," but since he could not, he would "try to explain it" in such a way that "if you will try to imagine in your minds as if you're watching television ... you'll see how the case is going to be presented to you and why it's presented in a certain way."

In the prosecutor's closing argument, however, we do find improprieties, including expressions of personal opinion and a misstatement of the law.

Regarding the expressions of personal opinion, we note that Directory Rule 7-106(c) of our State Bar Canons of Ethics states in part: "In appearing in his professional capacity before a tribunal, a lawyer shall not: (3) assert his personal knowledge of the facts in issue, except when testifying as a witness; (4) assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein." 252 Ga. at 629.

"Expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued." Commentary to ABA Standards for Criminal Justice 3-5.8(b) (2d Ed. 1980), p. 3-89.

[27] The prejudice emanating from such argument depends upon the context in which it is given. Although expressions of personal opinion are objectionable in any event, and should be avoided, nonetheless, when the evidentiary facts supporting such a conclusion are cited and the conclusion follows naturally from such facts, the mere use of the phrase "I think ..." as opposed to "I contend ...," or "I submit ...," or "The evidence shows ...," is unlikely to have a strong impact on the jury's independent evaluation of the evidence. *Cf. Conklin v. State*, 254 Ga. 558, 571, 331 S.E.2d 532 (1985); *Brooks v. Kemp*, supra, 762 F.2d at 1413-1414.

[28] Here, the prosecutor stated that he didn't "think" there was "any question" but that the butcher knife Ford wielded was a deadly weapon, that he "really" did not "think" the money Ford got was worth Sarah Dean's life, and that although the jury would have a hard job deciding the case, he "imagine[d]" Sarah Dean would "swap places with [the jury] real quick." In addition, he argued: "Here we have, according to all the testimony, and I didn't know Mrs. Dean, but I think if I did I'm sure she was a fine person. I did not know her but you heard the testimony from the people that did." Finally, he stated his dislike of Steven Cox.

Each of these arguments was objectionable (and also "easily avoided").[6] However, we find no reasonable probability that their exclusion would have changed the result at the guilt-innocence phase of the trial, even when considered in conjunction with the misstatement of the law dealt with below.

The misstatement occurred when the prosecutor argued as follows: "[T]he judge will charge you, that in malice, malice aforethought, number one, that a person intends the act that he committed. If they do something—if I come and grab the podium and I push it over, I intended to do that, unless it's proven otherwise. If you see me do that you're pretty sure that's what I intended, even though you can't read my mind. So a person commits an act and by that act a person is killed; the completion of that act causes death, that's a sufficient intent ... [T]hat is the intent that the law speaks of as to what did a person think. Did I do that action that I just discussed with you. Don't let that be confusing to you all."

This explanation was incorrect. *Francis v. Franklin*, — U.S. —, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Sandstrom v. Montana*, supra. However, the trial court's instructions on intent and malice were correct, and, considered in light of the strength of the evidence, were sufficient to cure the improper impact of the argument.

(i-2) The sentencing phase.

[29] We do not agree with Ford's contention that the prosecutor "unfairly summarized the controversy over the ... death penalty by focusing exclusively on retribution." Although there are other legitimate sentencing concerns, see *Conner v. State*, supra, a prosecutor is under no obligation to argue all of them.

[30-32] The prosecutor did not err by noting the obvious fact that the victim was gone and would never be here again. See *Brooks v. Kemp*, supra at 1409-10. Nor did the prosecutor err by arguing: "[O]ur government has determined that the death penalty is appropriate and necessary in certain cases and should be provided ... It's up to you to decide if this is that type of case that deserves the death penalty." This was a correct statement of the law. His further argument that law and order depended upon the confidence of the citizenry that criminals would receive the punishment they deserved was not improper. See *Conner v. State*, supra at 120, 303 S.E.2d 266 (quoting former U.S. Supreme Court Justice Stewart's plurality and concurring opinions in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), respectively).

[33] Finally, the prosecutor committed no impropriety by arguing that the jury was commanded "to do what is right and what is just," by following his discussion of the heinousness of the crime with the dramatic assertion that Sarah Dean would be "in there" with the jury, asking *for* justice; or by concluding: "By God we draw the line somewhere and this is it folks. Enough is enough and we draw the line. You say it for Sarah Dean, say it *for* all of us, enough is enough. It's got to stop. Thank you."

We do not, however, find that the prosecutor's argument was devoid of impropriety.

Our major concern is not the brief expression of a personal opinion early in his argument. The effect of this impropriety clearly was inconsequential.

The more serious impropriety occurred when the prosecutor argued as follows:

"If someone wants to forgive Ford, let Sarah Dean forgive him. She is the only one who has the right to do that. She and the Lord. Don't take that right away from her. Say, well that's all right Sarah, I'm going to forgive him for what he did to you. Don't take that away. That would be the worst tragedy we could have in this court for you to do that ...

"God is the only one who can forgive. He and Sarah Dean. Christ said you can turn the other cheek when you are hit but you can't turn the cheek for someone else. The law of God prescribes the law of man and to impose order on society we must have both ...

"Come back with whatever you like. It's your choice. But in fact, as I said before, not only would it be a travesty but a very sick joke against Sarah Dean ..."

[34] It is undoubtedly true that a jury has no right to forgive a defendant. See *Felker v. State*, 252 Ga. 351, 378, 314 S.E.2d 621 (1984). The fact of conviction, however, suffices to ensure that the jury

6. "This kind of argument is easily avoided by insisting that lawyers restrict themselves to statements such as 'the evidence shows ...' or 'something similar.' ABA Standards for Criminal Justice, supra at 3-89.

will not forgive the defendant. At the sentencing phase of the trial the question is not *whether* the defendant will be punished, it is, rather, *how much* he will be punished. Once a statutory aggravating circumstance is established, the issue is not forgiveness, it is mercy. By confusing these two terms, the prosecutor in effect argued that the jury had no right to be merciful. Such an argument is legally incorrect.

[35] "Just as retribution is an appropriate justification for imposing a capital sentence ... [so is] mercy ... an acceptable sentencing rationale." *Drake v. Kemp*, 762 F.2d 1449, 1460 (11th Cir.1985).

[36, 37] A prosecutor is entitled to "urge vigorously that a death sentence is" appropriate punishment in the case at hand ..." *Walker v. State*, 254 Ga. 149, 159, 327 S.E.2d 475 (1985). It follows that he is entitled also to "urge vigorously" that mercy is inappropriate "in the case at hand." To argue, however, that the jury has no *right* to be merciful goes too far, as does the characterization of the exercise of mercy as a "travesty and a sick joke." *Drake v. Kemp*, supra. Cf. ABA Standards for Criminal Justice 3-5.10 ("The prosecutor should not make public comments critical of a verdict, whether rendered by judge or jury.")

Having identified improprieties in the prosecutor's sentencing argument, we must now determine "whether there was a reasonable probability that the improper arguments changed the jury's exercise of discretion in choosing between life imprisonment or death." *Tucker v. Kemp*, 762 F.2d 1496, 1508 (11th Cir.1985).

Examining all the circumstances, we do not find a reasonable probability that, but for the improper argument, Ford would have received a life sentence.

First, as we noted above, the prosecutor had a right to argue that mercy was inappropriate in the case at hand, and much of the prosecutor's argument was devoted to a discussion of facts which supported his contention that the death penalty was called for in this case.

Second, the prosecutor did concede, albeit grudgingly, that the jury had the right to recommend a life sentence, and the defense attorney, for his part, pointed out that he was not asking the jury for forgiveness, excuse, or pardon—he was asking only for something less than a death sentence, and he called the jury's attention to the likelihood that if the jury opted for mercy, Ford could get "four life sentences and twenty years on top of that."

Third, the trial court's instructions informed the jury that it was the latter's responsibility "to determine within the limits prescribed by law the penalty that shall be imposed," explaining that every person found guilty of murder would be "punished by death or by imprisonment for life." The court instructed the jury to consider mitigating circumstances, which the court defined as "those which do not constitute a justification or excuse for the offense of murder, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability so as to justify a sentence of life imprisonment rather than death," and further explained that the jury could provide for a life sentence whether or not it found any mitigating circumstances, "for any reason satisfactory to [the jury], or for no reason."

These countervailing arguments and instructions mitigated to a large degree, if not completely, the impropriety of the prosecutor's argument.

We note that in this case "[t]here was overwhelming evidence of guilt, thus reducing to a minimum the chance that an innocent person will be executed." *Tucker v. Kemp*, 762 F.2d 1496, 1509 (11th Cir. 1985).[7]

Moreover, the jury found that the murder was "outrageously or wantonly vile, horrible or inhuman," and that it was committed during the commission of the additional capital felonies of armed robbery, kidnapping with bodily injury, and rape. See OCGA § 17-10-30(b)(2) and (b)(7). The victim gave Ford no reason to attack her; the crimes were entirely unprovoked, and the murder was preceded by serious physical and psychological abuse. The crime was indeed (as the prosecutor contended) "horrible."

In mitigation, it was shown that Ford had grown up without a father present, had experienced difficulty with his schoolwork, but had never before been in serious trouble. While not frivolous, these mitigating circumstances are hardly "commanding" in the face of the egregiousness of the crime. *Brooks v. Kemp*, supra at 1416. Compare *High v. Zant*, 250 Ga. 693, 694–95, 300 S.E.2d 654 (1983).

"Considered in light of all facts and circumstances of the case, the improper arguments, most of which were mitigated by other arguments and instructions by the court, were 'not sufficient to undermine confidence in the outcome.'" *Brooks v. Kemp*, supra at 1416.

(j) For the foregoing reasons, we find that neither attorney Edge's performance nor the prosecutor's improper argument justifies reversal of Ford's convictions or death sentence.

SENTENCE REVIEW

[38] 9. The jury found that the offense of murder was committed while the defendant was engaged in the commission of the additional capital felonies of rape, kidnapping with bodily injury, and armed robbery. See OCGA § 17-10-30(b)(2). Ford was convicted of these capital felonies at the guilt-innocence phase of the trial. Just as the evidence supports Ford's conviction for these offenses, the evidence supports the jury's findings in regard to the § b(2) aggravating circumstance.

[39] The jury also found that "the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture or depravity of mind." See OCGA § 17-10-30(b)(7). In this case, the victim clearly suffered serious and intentionally-inflicted physical and psychological abuse. She was kidnapped, raped, stuffed into the trunk of her own car, driven around for several hours, hit on the head with a metal road-sign (after pleading for her life), and pushed into a pond (still in the trunk of her car and still conscious), where she drowned. The evidence supports beyond a reasonable doubt the jury's findings of the § b(7) aggravating circumstance. OCGA § 17-10-35(c)(2). Compare *Whittington v. State*, 252 Ga. 169(9 b), 313 S.E.2d 73 (1984); *Phillips v. State*, 250 Ga. 236(6), 297 S.E.2d 217 (1982).

[40] 10. From our review of the record, including matters addressed in Division 8 of this opinion, we find that the sentence of death was not imposed under the influence of passion, prejudice, or other arbitrary factor. OCGA § 17-10-35(c)(1).

[41] 11. Ford's death sentence is not disproportionate to the life sentence received by co-defendant Steve Cox. See *Allen v. State*, 253 Ga. 390(8), 321 S.E.2d 710 (1984). Aside from the difference in ages (Cox was only 15 at the time of the crime), the evidence tends to show that Ford was the more culpable of the two, i.e., that he and not Cox drove the car, raped the victim, hit her with the road sign, let the car out of gear prior to pushing it into the pond, and got the money.

[42] In addition, Ford's death sentence is neither excessive nor disproportionate to sentences imposed in similar cases generally. OCGA § 17-10-35(c)(3). The similar cases listed in the Appendix support the imposition of the death penalty in this case.

Judgment affirmed.

All the Justices concur.

APPENDIX

Alderman v. State, 254 Ga. 206, 327 S.E.2d 168 (1985); *Allen v. State*, 253 Ga. 390, 321 S.E.2d 710 (1984); *Finney v. State*, 253 Ga. 346, 320 S.E.2d 147 (1984);

7. We note in addition that Ford testified at the sentencing phase—admitting the crimes, but asking for mercy.

APPENDIX—Continued

Brown v. State, 250 Ga. 66, 295 S.E.2d 727 (1982); *High v. State*, 247 Ga. 289, 276 S.E.2d 5 (1981); *Justus v. State*, 247 Ga. 276, 276 S.E.2d 242 (1981); *Green v. State*, 246 Ga. 598, 272 S.E.2d 475 (1980); *Stevens v. State*, 245 Ga. 583, 266 S.E.2d 194 (1980); *Burger v. State*, 245 Ga. 458, 265 S.E.2d 796 (1980); *Hardy v. State*, 245 Ga. 272, 264 S.E.2d 209 (1980); *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979); *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979); *Collins v. State*, 243 Ga. 291, 253 S.E.2d 729 (1979); *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d 472 (1979); *Johnson v. State*, 242 Ga. 649, 250 S.E.2d 394 (1978); *Westbrook v. State*, 242 Ga. 151, 249 S.E.2d 521 (1978); *Morgan v. State*, 241 Ga. 485, 246 S.E.2d 198 (1978); *Moore v. State*, 240 Ga. 807, 243 S.E.2d 1 (1978).

CITY OF ROSWELL, et al.
v.
DAVIS.
No. 42224.
Supreme Court of Georgia.
Oct. 30, 1985.

Civil rights action was brought against city, chief of police and police officer arising from incident in which officer stopped plaintiff husband and detained him while husband was enroute to hospital with his critically ill wife. The Superior Court, Fulton County, granted city's motion for judgment on the pleadings, and plaintiff appealed. The Supreme Court, 250 Ga. 8, 295 S.E.2d 317, affirmed in part and reversed in part. On remand, the Superior Court, George B. Culpepper, III, J., granted motion for j.n.o.v. and a new trial to chief of police and city, denied plaintiff's motion for attorney fees, and plaintiff appealed. The Court of Appeals, 174 Ga.App. 417, 330 S.E.2d 130, affirmed in part and reversed in part. After granting certiorari, the Supreme Court, Hill, C.J., held that evidence did not establish a "policy" of inadequate police training sufficient to support liability under section 1983.

Reversed.

Smith, J., dissented.

Civil Rights ⇐13.13(3)

Evidence in civil rights action against city, chief of police and police officer arising from incident in which officer stopped plaintiff and detained him while plaintiff was enroute to hospital with his critically ill wife did not establish a "policy" of inadequate police training sufficient to support liability under section 1983; officer legitimately stopped car only to discover that it bore critically ill woman; he then decided that, rather than allow plaintiff to proceed or to transport wife in his patrol car, better course of action was to call for emergency help to render aid and for an ambulance to transport wife to hospital, which was over eight miles away; in addition, officer called a supervising officer to the scene as he had been instructed to do. 42 U.S.C.A. § 1983.

Dennis J. Webb, Brian A. Boyle, Dennis, Corry, Webb & Carlock, Atlanta, for City of Roswell, et al.

Clifford H. Hardwick, Atlanta, for James R. Davis.

HILL, Chief Justice.

This is a civil rights case, involving the alleged inadequate training of a police officer, here on certiorari. *Davis v. Ramey*, 174 Ga.App. 417, 330 S.E.2d 130 (1985). On the morning of May 24, 1980, James Roy Davis was transporting his critically ill wife to the hospital when he was stopped by Roswell police officer Michael Douglas Ramey. Davis subsequently sued officer Ramey, the City of Roswell, and its chief of police, T.L. Joyner, alleging, inter alia, that

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ENUMERATION OF ERROR NUMBER II

APPELLANT WAS DENIED EQUAL PROTECTION, DUE PROCESS OF LAW, A RELIABLE SENTENCING DECISION, AND A REPRESENTATIVE CROSS SECTION OF THE COMMUNITY ON HIS TRIAL AND SENTENCING JURY IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

Over objection, Appellant was tried by a jury from which nine out of ten possible black jurors were struck through the use of the prosecutors peremptory challenges. It is time for this Court to examine its previous position, particularly in death cases where an individualized decision free of prejudice is supposed to be made, and require that the jury selection procedure be free of bias and discrimination.

In McCray v. New York, ____ U.S. _____, 33 Cr.L. 4067 (82-1381, May 31, 1983) Justice Marshall dissenting from the denial of certiorari declared that the State's use of peremptory challenges in a racially biased manner presented a "significant and recurring question of constitutional law." Swain v. Alabama, 380 U.S. 202 (1965), traditionally relied upon by the State to justify the racially biased use of peremptories has been almost universally condemned. See e.g., Note, "Limiting Peremptory Challenges: Representation of Groups on petit Juries", 86 Yale L.J. 1715 (1977).

Swain was decided on equal protection grounds; but, since Swain was decided before the United States Supreme Court applied the Sixth Amendment guarantees of a fair cross-section of the community on criminal juries to the states through the Fourteenth Amendment, it is no longer a viable basis for sanctioning clearly biased use of peremptories.

The Appellant argues that the racially biased use of peremptory challenges, violates his rights to equal protection, due process, a fair cross section of the community on his trial jury and a reliable sentencing determination in violation of the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. Taylor v. Louisiana, 419 U.S. 522 (1975); Commonwealth v. Soares, 377 mass. 461, 387 N.E. 2d 499 (1978), Cert. denied, 444 U.S. 881 (1979); People v. Wheeler, 33 Cal. 3rd 258, 148 Cal. rptr. 158, 583, P. 2d 748 (1978); Lockett v. Ohio, 438 U.S. 586 (1978).

In McCray v. Adams, _____ F2d _____ (2nd Cir. Case No. 84-2026 Dec. 1984) the Court held that since peremptory challenges were not a constitutional right a defendant's Sixth Amendment rights took precedence. The Court stated "the notion that all persons who share an attribute, such as skin color, will ipso facto view matters in the same way, and that minority groups are less able than whites to decide the case solely on the basis of the evidence, are both fallacious and pernicious ... we conclude that the Sixth Amendment's guarantee of trial by an impartial jury ... forbids the exercise of peremptory challenges to excuse jurors solely on the basis of racial affiliation."

The Court went on to adopt the Supreme Court's test for the establishment of a prima facie case of a Sixth Amendment violation with respect to the venire, as set forth in Duren v. Missouri, 439 U.S. 357, 364 (1976):

> In order to establish a prima facie case of a Sixth Amendment violation of the fair cross section requirement the defendant must show (1) that the group alleged to be excluded is

> a 'distinctive' group within the community; (2) that the representation of this group in venires is not fair and reasonable ... (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

In Florida v. Neil, 457 So. 2d 481 (Fla. 1984), the Florida Supreme Court recently recognized that the Swain test has "seldom, if ever, been met," Id. at 483, and reversed a conviction obtained in a case where a prosecutor had used his peremptory strikes in a facially biased manner. Although the Florida Court based its decision on the State Constitution, it cited as an authority for its position Taylor v. Louisiana, supra and McCray v. New York, supra. See Florida v. Neil, supra, N.5 at 484.

The test adopted by the Florida Court requires that a party concerned about the other side's use of peremptory challenges, (1) must make a timely objection, (2) demonstate on the record that the challenged persons are members of a distinct racial group and (3) that there is likelihood that they have been challenged solely because of their race.

Whether this Court applies the standards in Duren v. Missouri, supra, or the standards in Florida v. Neil, supra, Appellant is entitled to a new trial. Counsel for Appellant made a timely objection (Trial Trans. p. 270) and showed that the prosecutor had used nine of his ten (90%) peremptories to strike black prospective jurors in a case where there was a white victim and a black defendant. Under either test a presumption arose which was not rebutted by the State.

Because the Appellant was denied due process and a representative cross section of the community on his trial and sentencing jury in violation of the Sixth, Eighth and Fourteenth Amendments he should be given a new trial.

ENUMERATION OF ERROR NUMBER III

APPELLANT'S RIGHT TO DUE PROCESS OF LAW, AN IMPARTIAL TRIAL JUDGE, CONFRONTATION AND A RELAIABLE SENTENCING DETERMINATION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY THE TRIAL COURT'S COMMENTS ON THE CREDIBILITY OF WITNESS STEVEN COX.

During the testimony of Appellant's alleged accomplice, Steven Cox, the witness testified that he expected to receive a sentence of six years for his part in the crimes. The trial judge told the witness, before the jury, that "you're not going to get any six years". The prosecutor then, through leading questions got the witness to say "yes" to the question "I intend to recommend life plus twenty years on you, that's right, isn't it?" (Trial Trans. P. 407). The Court's comments were volunteered and unquestionably impacted on the credibility the jury assigned to Steven Cox's testimony.

Although the judge is allowed to question a witness, he may not do so in such a way that his credibility is affected, Brundage v. State, 143 Ga. App. 1 (1977); Anderson v. Warden, 696 F2d 296 (4th Cir. 1982), or that shows he has formed an opinion, Perdue v. State, 147 Ga. App. 648 (1978); DeFriese v. State, 232 Ga. 739 (1974); United States v. Martinez, 496 F2d 664, 668 (5th Cir. 1974). The Court is also not allowed to ask questions the tenor of which is prosecutorial. Harkey v. State, 159 Ga. App. 112, 113 (1981).